Ken Maddox Heating & Air Conditioning, Inc. *and* Sheet Metal Workers' International Association Local Union No. 20 a/w Sheet Metal Workers' International Association, AFL–CIO. Cases 25–CA–24297, 25–CA–24445, 25–CA–24987, and 25–CA–25565

September 5, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 15, 1998, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief answering the Respondent's exceptions, and the Respondent filed a brief in reply to the General Counsel's brief. On June 7, 2000, the Board remanded this proceeding for further consideration pursuant to *FES*, 331 NLRB 9 (2000), affd. 301 F.3d 83 (3d Cir. 2002). On December 8, 2000, Judge Beddow issued a supplemental decision, also attached here. The Respondent filed exceptions to the supplemental decision and a supporting brief, and the General Counsel and the Charging Party each filed briefs answering the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by maintaining a hiring policy that deprived 35 union members of both employment and consideration for employment. He further found that the one union member whom the Respondent knowingly hired was paid lower wages than other hires because of his union membership, also in violation of Section 8(a)(3) and (1). However, pursuant to our evaluation of the record as a whole, we conclude that there is insufficient evidence that the Respondent engaged in any unlawful discrimination. Accordingly, we will reverse the judge's findings and dismiss the complaint.[1]

[1] The Respondent has excepted to the judge's denial of its motion to reopen the record to present evidence concerning allegedly improper compensation of certain witnesses by the Charging Party. In light of our dismissal of the complaint on other grounds, we find it unnecessary to consider this exception and the judge's related findings in the "Statement of the Case" section of his supplemental decision.

A. Background and the Judge's Decisions

The relevant time period in this case runs from May 1995 until September 1997. The Respondent installs and services residential heating/ventilation/air-conditioning systems in the Indianapolis area. It employs between 20 and 30 workers as service technicians, installers, warehousemen, sheet metal workers, and helpers. The Respondent ran newspaper advertisements frequently throughout the time period, seeking to fill service technician, installer, and helper vacancies. Pursuant to a "salting" campaign, members of the Charging Party responded to the advertisements, both covertly (without revealing their union membership status), and overtly (openly indicating their union membership). Only 1 of the 37 overt union applicants named in the complaint was hired: Jesse Stamper. One covert union applicant, Steven Reintjes, was also hired. Overall, during the time period the Respondent hired 3 service technicians, 2 installers, and 51 helpers, a total of 56 vacancies filled.

The General Counsel alleged that the Respondent refused to consider for hire and refused to hire 36 overt union applicants because of their union membership, thereby violating 8(a)(3)'s prohibition against discrimination. The General Counsel also alleged that Stamper, although hired, was paid lower wages than other employees because of his union membership, also in violation of Section 8(a)(3) and (1).

The judge issued two decisions in this proceeding. In the first, he found that the Respondent's primary hiring policy was to give priority to applicants it had previously employed and to applicants referred by current employees and business associates. (This will be called "the referral policy" hereafter.) The judge also found that between 1991 and 1995, prior to the alleged unfair labor practices in this case, 95 percent of the Respondent's hires were by referral. In addition, he found that General Manager Anthony Walker and Operations Manager Richard Farquer, the two officials who made the Respondent's hiring decisions, routinely reviewed only the referral applications, and not those submitted outside the referral process.

The judge also found that the vast majority of the applications, the nonreferrals, were filed on receipt and reviewed only in a "top-of-the-pile" situation. Thus, according to the Respondent, if former employees or referred applicants were not available for an opening, Walker or Farquer proceeded alternatively to the "top of the pile," i.e., to the most recent, relevant, nonreferred application on file. It is apparent that most of the nonre-

ferred applications were submitted in response to the Respondent's newspaper advertisements.

The judge found that the referral policy was "inherently destructive of important employee rights" within the meaning of *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), because it precluded consideration of an entire class of applicants, i.e., overt union members. In his analysis, this finding satisfied the requirement of union animus to support the main discrimination allegations. He concluded that the policy itself violated Section 8(a)(3), and that 35 alleged discriminatees were denied employment consideration pursuant to the unlawful policy.[2] Moreover, the judge relied on this unfair labor practice finding to establish animus in concluding that the Respondent violated Section 8(a)(3) by paying Stamper lower starting wages than other similarly situated hires.

The Respondent filed exceptions to the judge's decision. While the case was pending on exceptions, the Board issued *FES*, supra, which clarified the analytical framework for refusal-to-hire and refusal-to-consider unfair labor practice allegations. The Board then remanded this proceeding to the judge for further consideration in light of the *FES* decision. In his supplemental decision, the judge added an analysis in conformance with *FES*; he affirmed his earlier findings to the extent consistent; and he concluded that the Respondent both refused to consider and refused to hire the alleged discriminatees pursuant to the unlawful referral policy. He also affirmed his earlier unfair labor practice findings concerning Stamper.

B. Discussion

1. The allegations regarding the 35 union applicants

a. The judge's finding of an unlawful referral policy

In its exceptions, the Respondent contends that the judge's finding that the referral policy itself was unlawful is erroneous because the General Counsel neither alleged such a violation in the complaint nor litigated this theory of a violation at the hearing. We agree.

As discussed more fully below, the General Counsel alleged that the overt union applicants whom the Respondent did not hire were each individual victims of discrimination. His theory of the violation was essentially that the alleged discriminatees were the subject of disparate treatment in the hiring process because of their union membership. The General Counsel never alleged that the Respondent's referral policy itself was in violation of the Act. Neither did he allege or litigate the *Great Dane* analysis applied by the judge in finding the policy unlawful and inherently representative of antiunion animus. The record makes clear that this was a posthearing addition to the case by the judge.

It is well established that the General Counsel's theory of the case is controlling. See, e.g., *Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999). It is equally well established that it is inappropriate to make unfair labor practice findings that were not fully and fairly litigated. See, e.g., *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992), enfd. 25 F.3d 473 (7th Cir.1994), cert. denied 513 U.S. 1080 (1995). Therefore, we reverse the finding that the Respondent's referral policy per se violated the Act. Moreover, we do not pass on the judge's theory that the policy was inherently destructive of employee rights under the *Great Dane* doctrine and sufficient by itself to establish animus.[3] These matters clearly were neither alleged nor litigated.

Accordingly, the allegations of unlawful discrimination in the complaint must be supported by affirmative proof establishing by a preponderance of the evidence that the Respondent's conduct was unlawfully motivated. As we will explain, such proof is lacking here.

b. The General Counsel's evidentiary showing

The General Counsel has contended that a discriminatory motive is established by the fact that, of 37 well-qualified overt union applicants during the relevant time period, only 1 was hired and that instead, 55 nonunion applicants were hired for 56 vacancies. But our review of the record demonstrates that the Respondent's hiring decisions regarding the alleged discriminatees were "based on neutral hiring policies, uniformly applied." *Sunland Construction Co.*, 309 NLRB 1224, 1229 fn. 33 (1992). The Board has found referral policies like the Respondent's to be legitimate employment practices.[4]

The General Counsel has not proved otherwise here. The Respondent's referral policy had been in existence since at least 1991—4 years before the alleged unfair labor practices in this case—and during that 4-year period 95 percent of the Respondent's hires were by referral. Thus, the policy was not specifically adopted to counter the Union's salting campaign. In turn, the evi-

[2] The judge found that 1 of the original 36 alleged discriminatees failed to respond to a call for a job interview with the Respondent, and he dismissed the discrimination allegation concerning him. No exceptions were filed to this finding. Thus, there are 35 union applicants at issue before us.

[3] In light of our procedural disposition of the *Great Dane* issue, we find it unnecessary to consider whether *Aztech Electric Co.*, 335 NLRB 260 (2001), enf. denied in relevant part sub nom. *Contractors' Labor Pool v. NLRB*, 323 F.3d 1051 (D.C. Cir. 2003), cited by our concurring colleague, was rightly decided.

[4] *Brandt Construction Co.*, 336 NLRB 733 (2001), petition for review denied sub nom. *Operating Engineers Local 150 v. NLRB*, 325 F.3d 818 (7th Cir. 2003); *Kanawha Stone Co.*, 334 NLRB 235, 236 (2001); *Zurn/N.E.P.C.O.*, supra; *Irwin Industries*, 325 NLRB 796, 798 (1998); *Belfance Electric, Inc.*, 319 NLRB 945, 946 (1995).

dence does not establish (1) that the Respondent's referral policy created a closed hiring system, effectively screening out union applicants; or (2) that the Respondent applied its hiring policies disparately.

The closed hiring system allegation

Without invoking *Great Dane*, supra, the General Counsel argues that the Respondent's referral policy created a closed hiring system because current employees would be unlikely to refer union members given the Respondent's nonunion status.

We reject that argument. Although there is no evidence that any union members were hired by referral during the relevant period, the General Counsel has not proved that the Respondent's policy inevitably bars union members from referral or that the Respondent adopted the policy in order to eliminate the possibility that union adherents would be hired. It is noteworthy that similar referral systems operated by nonunion employers have resulted in the hiring of union members. See *Kanawha Stone*, supra at 237; *Zurn/N.E.P.C.O.*, supra. Thus, the bare fact that no union applicants were hired under the referral policy, without more, is not a ground for inferring that the Respondent's hiring motives were unlawful.

Further, the record establishes that the referral procedure accounted for 50 of the 56 employees the Respondent hired. The remaining six hires—one union applicant and five nonunion applicants—were hired through the alternative "top-of-the-pile" process. In addition to the 35 union-member applicants at issue who were not referred and not hired, the record indicates that about 82 *nonunion* individuals who applied outside the referral system were not hired. Thus, the Respondent's hiring policy excluded large numbers of nonunion, as well as union, applicants who were not referred. Contrary to the General Counsel's view, this suggests that antiunion discrimination did not influence the Respondent's hiring decisions.[5]

The allegation of disparate operation

The judge, in agreement with the General Counsel's contentions, made certain findings that the Respondent operated its hiring policies on an inconsistent and/or disparate basis. This suggested that the policies were a pretext for antiunion discrimination, and, thus, that the Respondent's conduct was unlawfully motivated. In light of our review of the record, we do not agree that the Respondent operated its policies pretextually.

First, concerning the Respondent's "top-of-the-pile" rule for reviewing nonreferred applications, the judge found that General Manager Walker testified that he went to the top of the pile only one or two times during the relevant time period, yet the Respondent hired six nonreferred applicants. However, the judge ignored the testimony of Operations Manager Farquer, who stated that he went to the top of the pile between three and four times during the relevant period. The testimony of these two witnesses, who were both responsible for hiring, is consistent with the employment of six nonreferred applicants under the top-of-the-pile rule.

Further, the judge found that the nonreferred hiring of Steven Reintjes, the covert union applicant, and Jesse Stamper, the overt union applicant, were not consistent with the top-of-the-pile rule, i.e., theirs were not the most recent applications filed when they were hired.[6] The record, however, does not bear out the judge's findings.

Reintjes filed his application on April 15, 1996, and was hired on April 30, 1996. Between these two dates 10 of the alleged discriminatees applied, and it would seem, as the judge found, that these applicants should have taken "top-of-the-pile" precedence over Reintjes. However, Reintjes was hired as a helper in the Respondent's sheet-metal shop. The undisputed evidence establishes that, although the Respondent did not require experience before hiring installation helpers, layout and fabrication experience was required for the sheet metal shop helper's position. Of the alleged discriminatees who filed applications between April 15 and 30, Don Campbell, Ryan Striby, Eric Edwards, Jesse Stamper, Jason Wiley, Frank Sullivan, and Michael Wheatley did not list any layout or fabrication skills on their applications. Lloyd Campbell, Craig Gruell, and Darlene Haemmerle listed layout and/or fabrication as a "special skill," but none set out any prior employment using these skills. Distinct from these 10 applicants, Reintjes listed specific training in layout and fabrication, and over 3 years' recent job ex-

[5] In *Glenn's Trucking Co.*, 332 NLRB 880 (2000), enfd. 298 F.3d 502, (6th Cir. 2002), a case not involving a referral policy, the Board found that the extreme disparity between the hiring of nonunion and union applicants contributed to a finding of antiunion animus. The Board also relied on the pretextual quality of the employer's explanation of its hiring decisions. *Glenn's* is distinguishable from the present case in light of the Respondent's referral policy, which excluded applicants based on their nonreferred status rather than union membership, and in the absence of any other evidence that would support a finding of animus, as further discussed below.

[6] The judge also implied that the remaining four nonreferred hirings were inconsistent with this aspect of the rule as well. The record does not support the judge's findings concerning any of the four. James Lowes's application was dated September 11, 1995; he was hired on September 13, 1995. Tony Wise's application was dated October 8, 1996; he was hired on October 14, 1996. Damon Baker's application was dated June 17, 1997; he was hired on June 18, 1997. J. R. Roberts' application was dated June 26, 1997; he was hired on June 30, 1997. The hiring of these four nonreferred applicants appears fully consistent with the top-of-the-pile rule.

perience in these areas. Accordingly, given the requirement that the shop helper have relevant experience, it is apparent that the Respondent did follow its top-of-the-pile rule, settling on Reintjes' application because of his experience.

Jesse Stamper submitted his application on April 16, 1996, but was not hired until June 12, 1996, with several other applications, both union and nonunion, filed in the meantime. The undisputed evidence shows that there was an installation helper's position to be filled immediately on June 12. With no referral application in hand, Walker gave instructions to call recent nonreferred applicants based on a top-of-the-pile review. In the midst of this process, Stamper called, inquiring about the status of his application. Perceiving Stamper as the first applicant to respond, Walker invited him to interview and hired him that day. We find nothing inconsistent here with the Respondent's top-of-the-pile rule.

Thus, in disagreement with the judge, we find no significant evidence that the Respondent used the top-of-the-pile policy inconsistently or otherwise in a pretextual fashion.

In addition, the judge found the operation of the Respondent's referral policy pretextual because five applicants whom the Respondent said it hired as referrals did not supply a name in the "referred by" section of their applications. We have reviewed these applications and the undisputed testimony associated with them. Chris Campbell did not fill in the "referred by" box, but he wrote down General Manager Walker's name as a reference elsewhere on the application. Walker testified that Campbell is his nephew and that he, himself, referred Campbell. Donald Winters did not fill in the "referred by" box; Walker testified that he also referred Winters, who is his brother-in-law. Timothy Maynard was hired in 1996 and rehired in July 1997; he did not fill in the referral box the first time and wrote "friend" in the box the second time. The evidence shows that Maynard was a personal friend of Operations Manager Farquer when Farquer hired him in 1996, and that Maynard was rehired in 1997 because of his prior-employee status. Neil Brizendine did not fill in the referral box, but he listed "Ken Maddox" as a prior employer. Walker testified that Brizendine was hired because he was a prior employee. Scott Hale did not fill in the box, but he listed Farquer as a reference in another section of his application. Farquer testified that he both referred Hale and hired him.

We conclude that each of these five hirings was consistent with the Respondent's referral policy. They provide no evidence that the Respondent used the policy as a pretext to avoid hiring union members.

Finally, the judge also relied, as evidence of animus, on the fact that the Respondent ran frequent employment advertisements despite doing virtually all its hiring from referrals. Apparently, the judge found this practice suspect. We do not. The Respondent did not meet all its hiring needs through referrals alone, so it had to advertise for applicants. As to why it advertised so frequently, Farquer testified that when he could not fill a position through a referral, he contacted the most recent applicants because they were more likely than less recent applicants to still be available. This suggests a legitimate reason for frequent advertisements—to maintain a current pool of applicants likely to be available for employment.

Based on our review of the record, then, we conclude that there is no substantial evidence that the Respondent refused to hire, or refused to consider for hire, the 35 alleged discriminatees because of their union membership. Therefore, the relevant complaint allegations are dismissed.

2. The Stamper allegation

Jesse Stamper, an overt union applicant, was hired on June 12, 1996, as an installer's helper at $5 per hour. A month later, on July 12, he was given a raise to $6.50 per hour.

The General Counsel alleged that Stamper was paid unreasonably low wages when he started with the Respondent because of his union membership. The judge, applying *Wright Line*,[7] agreed, concluding that the Respondent's decision to pay low wages to Stamper violated Section 8(a)(3) and (1). He found that when Stamper and Walker discussed wages on June 12, Stamper sought $7 to $8 an hour based on his experience and the fact that he owned his own tools. The judge further found that Walker faced Stamper with a "take-it-or-leave-it" position at $5 per hour, and that Stamper acquiesced. The judge also found that only one other helper hired during the time period, Anthony Barrow, started at $5, but unlike Stamper, Barrow had no relevant experience. The judge found in addition that other helpers with less experience than Stamper were hired at higher wages. The judge relied on the 8(a)(3) violation he had already found concerning the 35 rejected union applicants as the primary basis for antiunion animus in his Stamper analysis. He concluded that the General Counsel ultimately proved that the Respondent had engaged in unlawful discrimination against Stamper. We disagree, and we will dismiss this allegation.

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Contrary to the judge, we have concluded above that there was no significant evidence of unlawful motivation supporting the unfair labor practice allegations concerning the 35 union applicants. Therefore, sufficient evidence of antiunion motive to support the Stamper allegation must be provided from some other source, if available.

Stamper testified that on June 12 Walker offered him $5 per hour to work for the Respondent as an installation helper. Relying on his experience and the fact that he had his own tools, Stamper requested between $7 and $8 an hour. Walker again offered $5, and Stamper accepted it. Stamper's testimony neither states nor suggests that Walker established a "take-it-or-leave-it" context during their discussion.

Walker's undisputed general testimony on the hiring of installation helpers and setting their wages is not inconsistent with Stamper's testimony. Walker stated that experience is not required for this helper position and that helpers are expected to supply their own tools. He testified that he offers $5 per hour as a starting point, and then it goes back and forth, the applicant and Walker negotiating until they arrive at a figure acceptable to both.[8]

Taking account of the testimony of Stamper and Walker, it is apparent that Stamper's experience and tool ownership were not critical factors in determining his starting wage level. It is also apparent that Stamper, for whatever reasons, chose not to negotiate with Walker, and instead quickly accepted the $5 offer. There are no grounds for finding unlawful motive on this evidence.

Even if we assume that the General Counsel provided a basis for inferring a discriminatory motive, the overall record establishes that the Respondent's treatment of Stamper would have been the same regardless of his union membership. It is true that Barrow, with very little experience, was hired at $5 per hour, and that other installation helpers were hired at higher pay than Stamper's. While this raises a question, it is explicable by the fact that, unlike Barrow and most of the others, Stamper was not hired pursuant to a referral. He was neither known to the Respondent nor endorsed by anyone known to the Respondent, and, thus, there was a more limited basis to predict Stamper's suitability for the job at the time he was hired. Also, Stamper was given a raise to $6.50 per hour—a wage rate more in line with what other installation helpers received—once the Respondent was able to evaluate his abilities.

The facts surrounding the setting of Stamper's initially low wages create, at most, a mere suspicion that his union membership was the motivating factor. However, this alone does not provide an adequate basis to find that the General Counsel proved unlawful discrimination. See, e.g., *Frierson Building Supply Co.*, 328 NLRB 1023, 1024 (1999). In the absence of any substantial evidence of unlawful conduct by the Respondent, we dismiss the Stamper allegation.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 5, 2003

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring.

The complaint alleged that the Respondent unlawfully refused to hire or consider for hire 35 individuals who were union members, and that it discriminatorily paid union member Jesse Stamper after he was hired. I agree with my colleagues that the judge's use of the *Great Dane*[1] doctrine to satisfy the animus requirement was not appropriate, because it was neither alleged nor litigated.[2] The majority's analysis of the allegations of unlawful discrimination is consistent with the framework established in *FES*[3] and *Wright Line*.[4]

[8] The judge found that Steven Reintjes' credited testimony concerning his hiring refuted Walker's position that he offers helpers $5 an hour and then negotiates. Reintjes testified that after discussing his fabrication and layout experience and giving Walker a demonstration of his skills, Walker offered him the shop helper's job and asked him what wages he would need. Reintjes responded "$7 an hour" and Walker agreed.

As we discussed previously, Reintjes was hired as a *shop* helper, a position that, unlike the installation helper position, requires specialized skills and prior experience. Accordingly, in disagreement with the judge, we find that his hiring situation is not comparable to Stamper's or to those of any of the installation helpers the Respondent hired.

[1] *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

[2] However, in my view, a *Great Dane* analysis of a referral policy like the Respondent's would be viable in a future case, if properly alleged and litigated. Compare, *Aztech Electric Co.*, 335 NLRB 260 (2001), enf. denied in relevant part sub nom. *Contractors' Labor Pool v. NLRB*, 323 F.3d 1051 (D.C. Cir. 2003), where the Board found that an employer's wage-comparability policy was inherently destructive of employee rights, relying in significant part on evidence of disparate impact similar in nature, if not in quantum, to the General Counsel's evidence in this case.

[3] 331 NLRB 9 (2000), affd. 301 F.3d 83 (3d Cir. 2002).

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

I believe that the record contains strong evidence that antiunion animus motivated the Respondent's failure to hire the union applicants. Thus, the Respondent engaged in voluminous newspaper advertising of job vacancies, while at the same time asserting that it relied almost exclusively on private referrals to fill those jobs. None of the employees hired by referral was a union member. There is also the fact that, of the applicants hired who were not referred, five were nonunion and only one was a union member.

However, even if the General Counsel had satisfied his initial evidentiary burden, the Respondent met its rebuttal burden under *Wright Line*, supra. It demonstrated that its hiring decisions regarding the alleged discriminates were "based on neutral hiring policies, uniformly applied." *Sunland Construction Co.*, 309 NLRB 1224, 1229 fn. 33 (1992). Further, the Respondent's referral policy satisfies the standard set out in my dissenting opinion in *Kelly Construction of Indiana*, 333 NLRB 1272, 1273 (2001). Thus, the policy was in existence long before the Union's salting campaign against the Respondent began, it appears to have been openly promulgated, and it was widely disseminated to those involved in the hiring process, i.e., General Manager Anthony Walker and Operations Manager Richard Farquer, the two hiring decisionmakers, as well as Office Manager Cheryl Maddox, who was involved in processing the applications.

Overall, because evaluation of the entire record persuades me that the Respondent must prevail here, I agree that the complaint is properly dismissed.

Dated, Washington, D.C. September 5, 2003

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Michael T. Beck and *Belinda J. Brown, Esqs.*, for the General Counsel.

Philip J. Gibbon Jr. and *Todd N. Nierman, Esqs.*, of Indianapolis, Indiana, for the Respondent.

Neal E. Gath, Esq. and *Michael E. Van Gordon*, of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Indianapolis, Indiana, on March 2–5, 1998. Subsequently to an extension in the filing date briefs were filed by the General Counsel and the Respondent. The proceeding is based upon an original charge filed October 26, 1995, as amended, by Sheet Metal Workers' International Association Local No. 20, a/w Sheet Metal Workers' International Association, AFL–CIO. The Regional Director's consolidated complaint dated January 30, 1998, alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by refused to hire named individuals because of the belief that they would engage in union or other protected concerted activities and to discourage employees from engaging in such activities and that it paid lower wages to employee Jerse Stamper because of his union membership.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged as a heating and air-conditioning contractor in the construction industry in the Indianapolis area. It annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside Indiana and it admits that at all times material is has a been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent is a residential heating and air-conditioning contractor with almost all of its work coming from installing heating and air-conditioning (HVAC) units in newly constructed homes. Of approximately 1500 installation jobs performed yearly only a few are performed for commercial facilities and it does not perform any industrial work.

Anthony Walker is the Respondent's general manager responsible for the Company's day-to-day operations. Operations Manager Richard Farquer is responsible for preparing the Company's material list and for scheduling employees and both Walker and Farquer are responsible for making hiring decisions.

In 1997, the Company had approximately 27 hourly employees in the categories of helper, installer, service technician, and shop help (21 in these categories in 1996, and 18 in these categories in 1995). About 18 of these employees work in the field as installers or helpers along with 3 service technicians. Respondent also has two employees who work in the shop fabricating sheet metal and two employees in its warehouse. The Company's work is highly seasonal, with a busy season from June through October when it typically employs twice the number of helpers as compared to the winter season. Installers work in the field actually installing the heating and air-conditioning units into the home. Installers also hang the necessary ductwork to move the air from the unit through the structure and they are required by the Respondent to have 2 years previous HVAC experience. Each installer has a helper who does whatever the installer needs done including unload materials and getting parts. Helpers hang ductwork but are not required by Respondent to have previous HVAC experience. Service technicians are responsible for troubleshooting and repairing residential HVAC equipment. Service techs also do

some installation work (about 10 percent of their job), and they are required by Respondent to have 2 years previous service experience. As noted, the shop help includes warehousemen and sheet metal man. Warehousemen load and unload trucks, keep track of the inventory, and prepare the inventory for the field employees but they are not required to have HVAC experience. Sheet metal men work in the shop laying out fittings and fabricating fittings for particular jobs, and they are required to have sheet metal fabrication experience.

On April 26, 1995, the Respondent ran an advertisement in the local newspaper which read, "HVAC Helpers needed no experience necessary. Apply at 5890 Churchman Ave." This same ad again on April 27 and 28, May 3 through 8, and May 10 through 12. On May 13, Respondent ran a new advertisement that read, "HVAC Installers and Helpers needed. Good Benefits. Apply at 5890 Churchman Ave." This ad ran from May 13 through 25.

On May 18, 1995, in response to the latter ad described above, Peter Williams and Tyrone Moore, both members of Sheet Metal Workers Local Union No. 20, applied for employment with the Respondent. Both men were wearing baseball style caps with the Union's insignia on them whey they went to the Respondent's facility and spoke to a receptionist. They were given applications for employment which they completed and returned. Both listed the Union as their current employer on the job application. The receptionist took the applications and told them a Tony Walker would be calling them, and both men left. Neither man was ever contacted by Respondent, and neither was ever offered an interview or a job by Respondent.

Williams and Moore accurately listed the Union as their current employer inasmuch as they were then participating in Local 20's apprenticeship program wherein apprentices are required to participate in a mandatory 6-month program known as the "Youth to Youth Program."

The Union's apprenticeship program lasts for 5 years and apprentice typically participates in the Youth to Youth Program during the third year of his apprenticeship. Pursuant to the collective-bargaining agreement between the Union and signatory sheet metal companies, apprentices take a 6-month leave of absence to fulfill the requirements of the Youth to Youth Program. During this time, the apprentices maintain the right to return to their jobs with the signatory contractors, however, the apprentice also holds the paid position of "organizer" while participating in the Youth to Youth Program. Signatory employers receive written notification from Union Business Agent Michael VanGordon that an apprentice has been directed to "begin the Youth to Youth portion of his apprenticeship" and also receives written notification from VanGordon when the apprentices are released from program to return to work.

Among other things, Youth to Youth organizers review local want ads related to their trade and thereafter visit nonunion employers to complete and submit applications for employment. Organizers utilize both "overt" and "covert," so called "salting" technics. When applying overtly, Youth to Youth participants reveal their union affiliation to prospective employers by wearing hats and clothing containing Local 20 insignia, listing Local 20 as their employer on employment applications, and sometimes by applying together in groups. When applying covertly, they do not reveal their union affiliation to prospective employers and they usually apply alone.

Youth to Youth organizers are paid the same hourly rate as that paid by the signatory sheet metal companies and until July 1996, if a organizer successfully salted into a nonunion company, the Union would pay the participant the difference between his union hourly rate and the hourly rate paid by the nonunion company, plus an additional $2-an-hour incentive. After July 1996, Youth to Youth organizers who successfully salted into nonunion companies continued to be paid by Local 20 and received whatever hourly rate was paid by the nonunion company as an additional incentive.

Youth to Youth organizers record their salting activities on a variety of union documents, including "Job Application Reports," "Call Back Log Sheets," and "Daily Salt Logs" and are expected to complete a job application report each time they apply at a nonunion company. This report from contains a section entitled "Affidavit" and reminds participants not to be vague because the section becomes "part of your SWORN AFFIDAVIT" (emphasis in original). Organizers are instructed to call companies where they have applied to check on the status of their applications and to complete a Call Back Sheet recording the details of their telephone conversation. Organizers also complete a "Daily Salt Log" to record their activities when they successfully salt into a company.

After Williams and Moore, other Youth to Youth organizers also applied for jobs with the Respondent between May 19, 1995, and March 12, 1997. Each testified that he or she was on leave of absence from their signatory sheet metal company and applied overtly. Each also were identified as having been named as a alleged discriminatee in similar unfair labor practices filed by Local 20 against other local companies.

On May 19, union member Donald McQueen Jr., went to Respondent's facility alone wearing his union cap. McQueen spoke to Office Manager Cheryl Maddox, the wife of owner Ken Maddox, and asked for an application, completed it and returned it to her. McQueen listed the Union as his current employer and organizer as his position. Cheryl Maddox told McQueen that there was no one there to speak to him and he left. McQueen subsequently called Respondent on three occasions, May 22 and June 9 and 14, 1995. Each time he spoke to Cheryl Maddox whose voice he recognized from their prior meeting. In the first call, Maddox again told him there was no one there to speak to him. When he called back the second time, Maddox said he would need to speak to Tony Walker who was not there at the time. McQueen then left his name and phone number, but no one called him back. In the third call, Maddox again told him there was no one there to speak with him. He was never contacted by Respondent or offered him an interview or a job.

On May 22, union member James Santacroce Jr. went to Respondent's facility alone wearing his union cap. He was given an application by a secretary which he completed and returned to her. Santacroce testified that as he was completing his application, an unknown individual walked through the office and asked if "all we union guys do is drove around putting in applications all day." Santacroce responded that he was just looking for employment. Santacroce called Respondent on June 15,

and spoke to a "Richard." Richard said he did not recall Santacroce's application but that he would find it and call Santacroce, but he was not offered an interview or employment.

Thereafter, the following organizer applicants "overtly" went to the Respondent's facility, sought to apply for jobs in response to the Respondent's ads, and completed applications that listed the Union as their current employer. On May 25, brothers Devin and Jason Tice were told by the receptionist told that the interviewer was too busy to speak with them. Devin Tice then asked who would be doing the interviews and was told that Tony Walker would review the applications and schedule interviews and that the applications were good for a year. On June 16, Devin Tice called and spoke to "Cheryl," asked for Tony Walker and was told he was not in. Jason Tice called Respondent on June 22 and 23, and was told that Tony Walker was not in. He left his name in both calls. Neither applicant was ever contacted or offered an interview or employment by Respondent.

On June 22, 23, and 24, Respondent again ran an ad in the local paper seeking both HVAC helpers and installers. Shortly thereafter, between July 6 and August 8, the Respondent hired six helpers. Following the June ads, Respondent ran additional ads on September 6, seeking HVAC helpers and installers.

On September 6, after seeing the latter ad, organizers Gabriel Brooking, Ronald Cornwell, Todd Huyghe, and Donald McQueen applied for employment with Respondent. As noted above, McQueen had previously applied on May 19, but had not been contacted. Between September 13 and 18, the Respondent hired two helpers and one installer.

On September 25, organizers James Hail and Stephen Hill applied for employment after seeing the ad run on September 24. They were told that applications were good for 1 year and that Tony and Richard handled the interviews. On September 26, five other union members responded to the ad described above. On that date union members Anthony Abel, Douglas Barkdull, Steven Rogers, George Sears, and Anthony Smith applied for employment with Respondent. On October 5, organizers Theodore DeFronzio and Brady Piercefield, who had seen the last ad run by Respondent, also applied for employment. Hill called on October 2 and 18, to check on his application and each time an unknown individual told him that they were not hiring. Abel also called about October 15 and was told they were not hiring. Meanwhile, the Respondent hired helpers on both September 25 and November 11.

On April 1, 1996, the applicant hired a service technician and on April 14, April 17 through 20, April 27 through May 5, and May 16 through 20, ran an advertisement in the local newspaper seeking "Heating & A/C Installers." This ad ran for a total of at least 18 days. On April 15, organizer Steven (Jake) Reintjes applied for employment in response to the ad run the previous day. Reintjes went to Respondent's alone, not wearing any union paraphernalia and proceeded to apply "covertly." He did not put any information on his application that would identify him as a union member.

On April 30, he received a call from Tony Walker who asked him to come in for an interview. Walker questioned him about his lay out and duct installation experience and Reintjes told him that he had experience in both areas. Walker told Reintjes that he might be getting in touch with him, called him the next day and asked him to come in and lay out a fitting. Reintjes did the fitting and Walker offered him a position in the shop. He asked Reintjes how much money he would need, and Reintjes said at least $7 an hour, and Walker agreed. Reintjes began work on May 7, and did not reveal his union affiliation to Respondent until August 1. He worked for Maddox without incident or complaint until August 9, when he voluntarily left. While working for Respondent, Walker asked him if he knew anyone who needed a job and when Reintjes recommended a friend, Tony Barrow (who was not affiliated with the Union) Barrow was hired on July 9.

On April 16, in response to the same ad, organizers Don Campbell, Lloyd Campbell, and Ryan Striby, overtly applied for employment. All three returned the next day and were again told that the interviewers were not available. They repeatedly called Respondent over the next several weeks and also went back to the facility several times and completed new applications.

Organizers Eric Edwards and Jesse Stamper, also applied for employment with Respondent on April 16, 1996. Edwards was never contacted and was never offered an interview or employment by Respondent.

On May 13, Stamper called Respondent to check on the status of his application, asked for Tony and was told that he was not in. Stamper called again on June 12, asked for Tony, and Walker got on the phone and asked if he had time to come in for an interview. When Stamper arrived that same day, Walker reviewed his application, and questioned him about what kind of work he had done for his previous employer. Stamper said he had worked there for a couple of years and had installed ductwork in buildings and offices. Walker asked him when he would be available, and Stamper said the next day. He was told a position was available at $5 an hour. Stamper replied that with his experience and given the fact that he had his own tools, he thought he should get $7–$8 an hour. Walker replied that the position was for $5 an hour, Stamper then accepted it,[1] and started work the next day. He worked without incident or complaint until approximately August 24, when he voluntarily left. While he was working there, the installer to whom Stamper was assigned, Keith, told Stamper that his previous helper had no experience and made $6.50 an hour.

On April 17, organizers Jason Wiley, Frank Sullivan, and Michael Wheatley went overtly to Respondent's facility and completed applications. All three contacted Respondent numerous times over the next several months and Sullivan completed new applications on May 20 and June 12. Wheatley reapplied on May 20, but Neither Wiley, Sullivan, or Wheatley were ever contacted by Respondent. Organizers Craig Gruell and Darlene Haemmerle, also applied on April 17. They repeatedly contacted Respondent over the next several weeks both by telephone and in person. Haemmerle reapplied on May 8, and Gruell reapplied on May 20. When Haemmerle went back to Respondent's facility on May 16, to check on the status of her application she saw that Respondent had posted a sign in

[1] At the time Stamper was hired the Union had already filed charges against Respondent in Cases 25–CA–24297 and 25–CA–24987.

front of its facility saying that they were accepting applications and were hiring HVAC installers and helpers. An identical sign was posted on the corner of the street.

On May 17, in response to an ad, organizer Keith Peacher applied overtly for employment with Michael Wheatley and Lloyd Campbell, who had already applied.

On May 20, organizer Kevin Hechinger applied for employment with Respondent and he called on June 5 and 10, to inquire about his application. On June 10, after his call, Hechinger received a message at the union hall that Respondent had called him. The message did not say who specifically had called and contained no instructions and Hechinger did not return the call.

On March 12, 1997 organizers Mark Chittum, Tim Choate, Michael Rohr, Steve Shea, and Corey Stein responded overtly to an ad that Respondent had placed in the local newspaper that day. The ad read in part, "Heating and air conditioning installers and apprentices needed. Two years residential experience necessary for installers. Six months residential experience preferred for apprentices."

On April 25, organizers Jason Ellis and David Walker applied for employment after seeing an ad that Respondent had run. With the exception of Stamper and Hechinger, none of the overt applicants were called back or hired.

The Respondent presented evidence tending to show that it has a history of hiring helpers, installers, and service technicians based upon referrals or recommendations from current employees and individuals "associated" with the company. Walker and Farquer frequently solicit employees for referrals and Respondent's employees, vendors and suppliers also provide it with unsolicited referrals.

The Respondent hired only two installers between May 18, 1995, and September 1997, Rob Kidwell on September 18, 1995 (Kidwell had almost 3 years prior residential HVAC experience with two local HVAC contractors), and Keith Kussman on April 10, 1997 (Kussman had over 3 years residential HVAC experience with two local contractors). It also hired three service technicians during the this time period, Robert McCormick on April 1, 1996 (who was referred by his son, Robert McCormick Jr., a company installer), Robert Juergenson on January 3, 1997 (Juergenson was a former company service technician who was rehired), and John Donaldson on June 27, 1997 (Donaldson was referred by installer John Coomer, and had extensive prior service technician experience).

The Respondent also hired 51 helpers between May 18, 1995, and September 10, 1997, and 46 were either referred by individuals employed by or associated with the Respondent or were former employees. Of the five individuals hired for helper positions who were not referred, two were union members, Stephen Reintjes (covertly), hired on May 7, 1996, and Jesse Stamper (overtly) on June 13, 1996.

III. DISCUSSION

This proceeding involves the Respondent's apparent failure to hire union affiliated applicants for positions as heating and air-conditioning helper, installer and service technician and the allegedly discriminatory underpayment of the one union affiliated applicant who was hired.

The Board endorses a causation test for cases turning on employer motivation, see *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), however, the foundation of 8(a)(1) and (3) "failure to hire" allegations rest on the holding of the Supreme Court ruling that an employer may not discriminate against an applicant because of that person's union status, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–187 (1941).

Based on the test set forth in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), and *KRI Constructors*, 290 NLRB 802, 811 (1988), and case cited therein, it is found that in a case of this nature the General Counsel meets his initial burden of proof when he establishes that (1) an individual files an employment application; (2) the employer refused to hire the applicant; (3) the applicant is or might be expected to be a union supporter; (4) the employer has knowledge of the applicant's union sympathies; (5) the employer maintains animus against union activity; and (6) the employer refuses to hire the applicant because of such animus. In order to rebut the General Counsel's case, the employer must establish that the applicant would not have been hired absent the discriminatory motive. The qualifications of job applicant may be an expected element of why an employer might refuse to hire any individual and, accordingly, it is customary in relation to criteria (1) that the record be developed to show that an applicant has the basic job experience or training to match up with the position for which an employer is seeking or accepting applications. However, there is no requirement that the General Counsel show (at this stage of the proceeding) that an applicant has superior qualifications that would mandate his selection for employment. Therefore, a resolution of an applicant's total qualifications beyond his basic suitability for the position involved is not an issue relevant to the basic criteria necessary to prove a violation of the Act. The Respondent, however, asserts that the General Counsel failed to show the applicants were qualified for the position for which it was seeking applicants and did not "match up" applicants with available jobs citing in *NLRB v. Fluor Daniel, Inc.*, 102 F.3d 818 (6th Cir. 1996).

This case does not arise in the Sixth Circuit and I find that it would be improper for me to rely on a court of appeals decision instead of relevant Board decisions on the issues, see *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984), in which the Board emphasized that "it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed," citing *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). See also *Ford Motor Co.*, 230 NLRB 716, 718 fn. 12 (1977), enfd. 571 F.2d 993, 996–1002 (7th Cir. 1978), affd. 441 U.S. 488, 493 fn. 6 (1979), and *TCI West, Inc.*, 322 NLRB 928 (1997). Accordingly, I shall follow the Board's precedent on the issue and I find that under the applicable Board criteria noted above the relevance of the qualification and job "match up" issue is primarily one for examination at the compliance stage of the proceeding, see *Fluor Daniel Inc.*, 304 NLRB at 981, and *Dean Contractors*, 285 NLRB 573–574 (1987).

The Respondent also asserts that there is no showing of animus, that it chose to hire persons other than the alleged discriminatees for legitimate nondiscriminatory reasons and that, otherwise, the alleged discriminatees were not bona fide applicants and that their participation in the Union's Youth to Youth Program created a disqualifying conflict of interest for legitimate employment with a nonunion company.

Turning to the specific criteria and the evidence of record I find that it is clear that (1) applications were filed; (2) the Respondent refused to hire (or even consider) these applicants, with one exception; and (3) the applicants overtly displayed their union affiliation both by wearing union paraphernalia and by identifying their "present" employment as "union organizer," listing their participation in the Union's apprenticeship program, and their past employment as sheet metal apprentices at union sheet metal companies. With regard to item (4), it is shown that Respondent's office manager and wife of the owner dealt directly with some applicants wearing union paraphernalia and I credit organizer Santacroce's testimony that someone in the Respondent's office asked if "all we union guys do is drive around putting in applications all day." Otherwise, even thought it asserts that management people never looked at most of the applications, the Respondent appears to concede that it was aware of the Union's repeated filing attempts.

The Respondent contends that there is no showing of animus (5), pointing out that it hired overt organizer Stamper and called organizer Hechinger at the union hall. This argument appears to be disingenuous at best, inasmuch as when Stamper was hired on June 12, 1996, two of the involved unfair labor changes already had been filed. Moreover, the terms of Stamper's employment (at only $5 an hour for an experienced apprentice with his own tools), as discussed below, demonstrates an independent indication of animus inasmuch it shows other conduct by the Respondent in violation of the Act.

While the Respondent's general manager, Walker, presents the appearance of a benign attitude towards unions, it is unnecessary for the General Counsel to show blatant actions on the part of an employer in order to demonstrate antiunion animus and here, the Respondent does not persuasively show valid reasons why it did not consider looking at union-related applications for employment.

The Respondent describes a consistent practice of soliciting and relying primarily on referrals for its hiring needs (approximately 95 percent of it hiring between 1991 and 1995). Despite the fact that it frequently runs newspaper ads seeking employees, it maintains that because the majority of its hiring needs are satisfied through the referral policy, Walker and Farquer (who do all hiring except for the few service technicians hired by the owner) never seek the bulk of the applications submitted by individuals who seek employment. This asserted practice results in a procedure which, in practice, effectively screens out applications filed by union-related applicants (who presumably would not be referred to the Respondent by employees who are likely to know their employer is nonunion and does not pay union wages). The Respondent's predominant reliance on this procedure effectively precludes consideration of an entire class of applicant and it constitutes a discriminatory practice inherently destructive of important employee rights. Accordingly, I find that the record is sufficient to show animus and that animus otherwise is implicit in its discriminatory practices and can be found here even without specific proof of antiunion motivation, see *J. E. Merit Constructors, Inc.*, 302 NLRB 301, 304 (1991), and *Great Dane Trailers*, 388 U.S. 26, 34 (1967).

Lastly, (6) I find that the record is sufficient to support an inference that the Respondent antiunion animus was a motivating factor in its decision to fulfill its hiring needs almost exclusively by referrals while at the some time, running want ads and accepting applications but ostensibly not bothering to look at those application, conduct which precluded even the consideration of union affiliated applicants.

Here, the Respondent attempts to refute the General Counsel's showing by asserting the legitimacy of it hiring practices and by making a collateral attack on the Union's organizational practices. In addition, it asserts that there is no credible evidence that Stamper's starting hourly rate was determined or influenced by his union membership.

Turning to the issue of the Union's Youth to Youth Program, it is apparent that the Union, as the collective-bargaining representative of the sheet metal trade employees, has the status, the right and the obligation to pursue strategies and actions that it perceives to be in the interest of those it represents. The fact that employees were given some minimal compensation while they are in the 6-moth leave of absence period of their apprenticeship program or working for a nonunion contractor does not create some adversarial conflict of interest situation. The Respondent offers no case law in support of it assertions and I find that the record fails to present any type of conflict of interest outlawed by the Act, see the discussion in *Montank Bus Co.*, 324 NLRB 1138, 1146–1147 (1997).

The law otherwise permits a union to make nonmalicious, noncoercive efforts to put pressure on a company to accede to a union's bargaining demands or organizational efforts or to protest unfair labor practices, see *Burns Security Services*, 324 NLRB 485 (1997), and here the Respondent shows no extraordinary circumstance that would strip the Union of its rights to engage in organizational activities and to maintain the economic status of its organizers. By the same token, the use of union members, not otherwise employed in the trade, as paid "salts" does not affect their status as statutory employees and it does not deprive them or the Union of protection under the Act, compare, *M. J. Mechanical Services*, 324 NLRB 812 (1997).

The Board's decisions in *Sunland Construction Co.*, 309 NLRB 1224 (1992), and *Ultrasystems Western Constructors*, 310 NLRB 545 (1993), found unequivocally that paid union organizers are statutory employees entitled to the protection of the Act, and the fact that their employment period might be of limited duration does not act to invalidate that status.

Here, several organizers testified that they had had occasion to be offered employment and that they accepted and worked for varying periods. The organizers also testified as to their willingness to accept employment if offered and to work to the best of their ability and Stamper in fact did accept work and performed successfully. Moreover, sheet metal worker positions and other jobs in the construction industry are recognized by the Board as being subject to frequent turnover and the Respondent's own records demonstrate that its business and its

hiring practices show a heavy reliance on "helpers" as compared with more experienced "installers" and it has seasonal peaks and a high turnover in it "helper" ranks. Otherwise, the Respondent's speculation about the availability of the applicant to work does not adversely affect their status as bona fide applicants and, accordingly, I find that consistent with Board president and the Supreme Court's decision in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), all the involved applicant discriminatees are bona fide applicants.

Here, the real issue is the basic question of whether the union affiliated job applicant were discriminated against because of the Respondent's bias against their status. Discrimination can be shown if the Respondent's hiring practices are such that they are inherently destructive of the applicant rights to be treated without discrimination, whether it be because of their national origin, religious discipline, sex, or membership or nonmembership in a union.

The utilization of blatant overt "testers" or misinformation or untruths by covert "testers" by a party that is the perceived victim of discrimination, especially after it has experienced apparent discrimination, is a legitimate practice that does not adversely affect the credibility of the testers or the reliability of the information that may be developed. Here, there is no indication that "salting" was a subterfuge to further any purpose unrelated to organizing and it is immaterial that the "salts" are unsuccessful or do not even distribute union authorization cards, petition for an election, or demand bargaining.

Here, the record support a conclusion that the applicant discriminatees were seriously interested in engaging in employment, they made no misrepresentation of their ability to perform the work involved or described in the Respondent's ads, and their status as third-year apprentices, often with other experience, made them presumptively qualified for positions as both helpers and installers. The Respondent basically ignored their applications and it had no way of knowing the specifics of the individual qualifications at the time it rejected their applications for further consideration.

Here, the Union and its organizers were not acting unilaterally but sought employment following the Respondent's public advertisements seeking helpers and installers. When union affiliated applicants filled out an application, the Respondent then applied an almost exclusively subjective procedure and "needed" to fill available positions only when it got a so-called "referral" or when an apparent nonunion applicant arrived. The Respondent thereby almost never "needed" to use its criteria of last resort, to look at applications on the "top of the pile," the only way a noncovert union applicant could or would be considered.

The Respondent advertised extensively with ads that said helpers (as well as installers), were "needed" and in fact helpers were hired on 51 occasions between May 1995 and September 1997. Yet (with minor exceptions), the Respondent refused to even look at applications that were filed at various times (generally right after ads were published). The alleged discriminatees used the procedure advertised but the Respondent basically failed to contact, interview or hire any of them. The Respondent used a different, unpublicized referral procedure which resulted in the hiring of only employees who were nonunion. The Respondent's reliance on hiring only those who were referred by nonunion employees, essentially precluded union members from being considered and this hiring procedure allowed the Respondent to perpetuate a nonunion work force. The "practical effect" of the Respondent's hiring practice was to preclude employment of union members and it reinforces the conclusion that the union applicants were not considered simply because of their union affiliation, see D.*S.F. Concrete Forms*, 303 NLRB 890 (1991).

Under these circumstances, I find that the Respondent has failed to persuasively rebut the General Counsel's showing of unlawful motivation and, accordingly, I find that the General Counsel has met its overall burden and shown that the Respondent's failure and refusal to consider and hire the discriminatees named below violated Section 8(a)(3) and (1) of the Act, as alleged.

As noted above, on April 16, 1996, Jesse Stamper overtly applied for work in response to an ad run on April 14 seeking "Heating & A/C Installers." The same ad ran April 17–20 and April 27–May 5, and Stamper checked on his application on May 13. The same ad ran again between May 16 and 20 and Stamper's followup call on June 12 resulted in contact with General Manager Walker and an interview that same day.

A review of the Respondent's hiring records shown that after a lapse of 5 months it began hiring helpers again in mid-April 1996. It hired 9 helpers (including covert applicant Reintjes) between April 15 and May 30, then hired Stamper in June and 12 more helpers between July 9 (when Reintjes inexperienced friend Barrows was hired), and mid-October. Interestingly, although the ads run in the spring of 1996, sought installers, not helpers, only helpers were hired and the next person hired as on installer was not hired until April 1997.

When covert applicant Reintjes was hired on May 7, he was asked what wage he needed and Walker readily agreed to "at least $7.00 an hour." Stamper, on the other hand, was offered only $5 an hour and when he pointed his experience and possession of tools, he was abruptly faced with a take-it-or-leave-it situation when Walker repeated that the position was for $5 an hour. Of the 56 other individuals hired by Respondent during the relevant period, only 1 other individual, Barrows, who had no experience, was paid as low as $5 an hour and a review of the record of individuals hired by Respondent show that many individuals who listed no previous experience were paid at a significantly hirer rate than Stamper.

The Respondent's animus has been discussed above and the Respondent was aware that Stamper was a union organizer and, under these circumstances, I find that the General Counsel has made a showing sufficient to support an inference that the activities of Stamper and the other union organizers were a motivating factor in Respondent's decision to offer and pay Stamper little more than minimum wage. Accordingly, the testimony will be discussed and the record evaluated in keeping the criteria set forth in *Wright Line*, supra, and *Transportation Management Corp.*, supra, to consider Respondent's defense and whether the General Counsel has carried his overall burden.

As pointed out by the Court, in *Transportation Management Corp.*, supra:

> an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity.

Here, the Respondent contends that Walker offered all helpers $5 an hour and Walker implied that he then talks back and forth and arrives at a pay rate. This assertion is refuted by Reintjes credible testimony that he first was asked, "[W]hat he needed," and I find that Walker was merely testifying in generalities when he discussed these events. I find that Stamper gave a detailed and forthright description of his attempt to negotiate with Walker and I discredit Walkers statement that Stamper "didn't say anything."

Stamper had a valid reason to fear or believe that he wouldn't be hired if he attempted to pursue a higher wage scale than Walker continued to offer. Moreover, charges already had been filed at this date regarding the Respondent's failure to hire and it is possible to infer that the low rate was offered in anticipation that it would be rejected, while allowing the Respondent to establish a defense that it had made employment offers to some union affiliated applicants. Walker's explanation that Stamper was given the lower rate only because he didn't negotiate harder is unpersuasive and I find that the Respondent has not shown that it would have offered and paid such a low rate were it not for Stamper's union affiliation. I further conclude that the General Counsel otherwise has met its overall burden of proof and I find that the Respondent's offer and payment of a lower pay rate than other helpers was discriminatory and in violation of Section 8(a)(3) and (1) of the Act, as alleged.

To the extent that the Respondent argues that it would not have hired all of the applicants, even if it had chosen to consider these applicants for employment, the matter of the specific number of jobs is relevant to the compliance stage of this proceeding and does not affect the basic determination of the illegality of its practice inasmuch as there clearly were jobs available at the various times that the applications were ignored and the record shows that between 51 helpers and 2 installers were hired May 18, 1995, and September 10, 1997.

Although not all of the discriminatees will necessarily be matched with positions that were available and were filed by other applicants or so called referrals, determination of the matchup can be analyzed at the compliance stage of the proceeding in order to best fashion and implement a remedy that is balanced and which "neutralizes" the Respondent's discrimination. Otherwise, I find that applicant Hechinger failed to respond to a phone call from the Respondent and thereby waived any claim for relief in this matter.

The discriminatees' participation in the Youth to Youth Program and the issue of mitigation of damages (raised on brief by the Respondent), also is a matter for compliance and it does not act to preclude each person viability as a legitimate job applicant. As show by Stamper's acceptance of a job offer and each applicants' testimony, they were interested in accepting employment and were not precluded from doing so by their participation in the Union's apprenticeship program. The probability that many or most of them would ultimately return to the jobs from which they were on leave of absence, does not make them any less a victim of the Respondent's discriminatory practices or any less entitled to relief. Moreover, it would appear that the very practice that the Respondent complains about (the Union payments to Youth to Youth organizers), arguably can be said to be classifiable as interim earning and thereby mitigation of damages. This, however, could undoubtedly frustrate the objections of the Act by undermining the deterrent effect of imposing a monetary burden on the wrong doer but, again, this is a matter for resolution at the compliance stage.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in a pattern or practice that allows screening of job applicants to determine suspected union sympathizers and by refusing to consider applicants for employment unless they were referred by nonunion sources, Respondent discriminated in regard to hire in order to discourage union membership in violation of Section 8(a)(3) and (1) of the Act.

4. By employing union sympathizer Jesse Stamper at a lower rate than other helpers because of his union affiliation the Respondent discriminated in regard to terms and conditions of employment and thereby discouraged union membership in violation of Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

It having been found that the Respondent unlawfully discriminated against job applicants including Tyrone Moore, Peter Williams, Donald McQueen Jr., James Santacroce Jr., Devin Tice, Jason Tice, Gabriel Brooking, Ronald L. Cornwell Jr., Todd M. Huyghe, James A. Hale, Stephen M. Hill, Anthony R. Abel, Douglas A. Barkdull, Steven J. Rogers, George R. Sears, Anthony W. Smith, Theodore A. DeFronzie Jr., Brady P. Piercefield, Don A. Cambell, Lloyd T. Campbell, Ryan M. Striby, Jason A. Wiley, Eric J. Edwards, Craig A. Gruell, Darlene J. Haemmerle, Frank J. Sullivan II, Michael J. Wheatley, Keith A. Peacher, Mark Chittum, Tim Choate, Michael Rohr, Steven Shea, Corey Stein, Jason Ellis, and David Walker, based on their suspected union sympathies and because they were not "referred" to the Respondent, it will be recommended that Respondent be ordered to consider them for employment and make them whole for any loss of earnings they may have suffered by reason of the failure to give them nondiscriminatory consideration for employment, by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), computed on a quarterly basis with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2] It also having been found that the Respondent

[2] Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

discriminatorily paid Jesse Stamper at a lower rate than other helpers, it will be recommended that he be made whole by paying him the difference between the $5-an-hour rate he received and the rate paid to other starting helpers with his experience, plus interest as noted above.

Other considerations regarding the Remedy and the specifics of the relief granted must wait until the compliance stage of the proceeding, see *Fluor Daniel, Inc.*, 304 NLRB 970, 981 (1991); *Dean General Contractors*, 285 NLRB 573, 573–574 (1987); and *3E Co.*, 322 NLRB 1058 (1997). Otherwise, it is not considered necessary that a broad Order be issued.

On the foregoing findings of fact and conclusions of law, on the entire record, and pursuant to Section 10(c) of the Act I hereby issue the following recommended[3]

ORDER

The Respondent, Kim Maddox Heating & Air Conditioning, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating in the rate of pay offered and paid to applicants known to be affiliated with a union.

(b) Refusing to consider for employment job applicants for the position of heating and air-conditioning helper and installer because they are members or sympathizers of the Union or because they were not referred to the Respondent.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, consider for hire Tyrone Moore, Peter Williams, Donald McQueen Jr., James Santacroce Jr., Devin Tice, Jason Tice, Gabriel Brooking, Ronald L. Cornwell Jr., Todd M. Huyghe, James A. Hale, Stephen M. Hill, Anthony R. Abel, Douglas A. Barkdull, Steven J. Rogers, George R. Sears, Anthony W. Smith, Theodore A. DeFronzie Jr., Brady P. Piercefield, Don A. Cambell, Lloyd T. Campbell, Ryan M. Striby, Jason A. Wiley, Eric J. Edwards, Craig A. Gruell, Darlene J. Haemmerle, Fran J. Sullivan II, Michael J. Wheatley, Keith A. Peacher, Mark Chittum, Tim Choate, Michael Rohr, Steven Shea, Corey Stein, Jason Ellis, and David Walker in positions for which they applied, or if such positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them as set forth in the remedy section of the decision.

(b) Within 14 days of this Order, make whole Jesse Stamper for all losses he incurred as a result of the discrimination against him, in the manner specified in the remedy section and remove from its files any reference to the lower wages paid to Jesse Stamper and notify him in writing that this has been done and that its paying him lower wages will not be used against him any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days of service by the Region, post at its Indianapolis, Indiana facilities and all current jobsites copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a reasonable official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. June 15, 1998.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to consider for employment job applicants for the position of heating and air-conditioner helper and installer because they are members of sympathizers of the Union or because they have not been referred to the Respondent.

WE WILL NOT discriminate in the rate of pay offered and paid to job applicants know to be affiliated with a union.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, consider for hire Tyrone Moore, Peter Williams, Donald

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

McQueen Jr., James Santacroce Jr., Devin Tice, Jason Tice, Gabriel Brooking, Ronald L. Cornwell Jr., Todd M. Huyghe, James A. Hale, Stephen M. Hill, Anthony R. Abel, Douglas A. Barkdull, Steven J. Rogers, George R. Sears, Anthony W. Smith, Theodore A. DeFronzie Jr., Brady P. Piercefield, Don A. Cambell, Lloyd T. Campbell, Ryan M. Striby, Jason A. Wiley, Eric J. Edwards, Craig A. Gruell, Darlene J. Haemmerle, Fran J. Sullivan II, Michael J. Wheatley, Keith A. Peacher, Mark Chittum, Tim Choate, Michael Rohr, Steven Shea, Corey Stein, Jason Ellis, and David Walker in positions for which they applied, or if such positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings they may have suffered by reason of the discrimination against, with interest.

WE WILL within 14 days of the Board's Order make whole Jesse Stamper for all losses incurred as a result of the discrimination against him, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Jesse Stamper's lower rate of pay, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the evidence of this low pay rate will not be used against him in any way.

KEN MADDOX HEATING & AIR CONDITIONING, INC.

Michael T. Beck and *Belinda J Brown, Esqs.,* for the General Counsel.

Phillip J. Gibbons Jr. and *Todd N. Nierman, Esqs.,* of Indianapolis, Indiana, for the Respondent.

Neal E. Gath and *Michael E. Van Gordon, Esqs.,* of Indianapolis, Indiana, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Indianapolis, Indiana, on March 2–5, 1998, briefs were filed and a decision (JD–76–98) was issued on June 15, 1998.

On June 7, 2000, the Board remanded this case for further consideration in light of the May 11, 2000, decision in *FES*, 331 NLRB 9. On August 2, 2000, the parties were invited to file supplemental briefs addressing the issues set forth in the Board's remand, specifically addressing the framework of the *FES* decision as it applies to the record in this case.

Subsequently, supplemental briefs were filed by the General Counsel and the Respondent. The Respondent also moved to reopen the record to present evidence showing that the Charging Party improperly compensated this alleged discriminatees for their testimony as witnesses called by the General Counsel. Both the General Counsel and the Charging Party filed pleadings opposing the motion.

The Respondent contends that in a Board hearing in the spring of 2000, it learned that pursuant to the Charging Party's policy, Local 20 compensates ex-program participants for time spent testifying on behalf of the Board. In addition, Local 20's policy provides for reimbursement for parking expenses incurred when complying with the General Counsel's subpoena and for time spent with the General Counsel's attorneys while preparing for trial. For this reason it sought to disallow the witnesses testimony, however, Administrative Law Judge Bruce Rosenstein rejected the Respondent's contentions.

Here, the Respondent argues that under18 U.S.C. § 201(c)(3) a party may not compensate another party's witnesses, it argues that the practice is improper and tantamount to witness tampering and it request that the witnesses' testimony be declared incompetent.

The General Counsel's first witness, Anthony Walker, is the Respondent's general manager (and its former production manager) and he subsequently also testified as one of the witnesses called by the Respondent. The Respondent does not show that Walker's first appearance occurred while he was denied his regular compensation from the Company nor does it suggest that Walker was incompetent to testify or that his appearance was improper.

As noted by the General Counsel and the Charging Party, the Respondent cites no Board decision which supports its position and it appears that the genesis of its argument is based upon the dissenting opinion in *NLRB v. Thermon Heat Tracing Services,* 143 F.3d 181, 189 (5th Cir 1998). Even that opinion, however, distinguishes the subject there under discussion, assertly payments to an informer to gather information, from payments from a union that are a subsidy to offset lower wage rates. Moreover, footnote 4 of that dissent notes that the rule does not appear to cover situations where an employee testifies at a trial yet continues to be paid a salary as an employee. The Respondent also cites *Golden Door Jewelry Creations, Inc*., 865 F.Supp. 1516, 1524–1526 (S.D. Fla. 1994), affd. in part 117 F.3d 1328, 1335 fn. 2 (11th Cir. (1997), also cited in the *Thermon Heat* dissent, supra. There, however, the court *rejected* the arguments that the payments to the witnesses fell within rule 201(c)(2), but considered it to be an ethics question.

The *Therman Heat* dissent goes on to note that the ABA Committee on Professional Ethics and Grievances in Formal Op 402 (1996), held that payment by an "attorney" to compensate a witness for losses due to time spent preparing for testimony at trial does not violate Model Rules of Professional Conduct Rule 3.4(6), and I find that under the circumstances that are common to Board proceedings, a rule that would prohibit reimbursement of out of pocket or lost wage expenses of witnesses by either a respondent or a charging party would be punitive in nature, would tend to inhibit the availability of witnesses and would serve no useful purpose in cases arising under the Act. I also find that the alleged payments involved here are not shown to fall within any Federal Rules of Practice or ethical prohibitions and, therefore, the Respondent has not shown good cause that would require reopening of its record to allow the production of evidence bearing on this issue. Accordingly, the Respondent's motion is denied.

As noted in my invitation to file supplemental briefs, I made factual findings in my prior decision to the effect that the Respondent advertised extensively with ads for helpers or installers that it "needed" and that it hired 51 helpers between May 1995 and September 1997, a period in which it refused to consider approximately 36 union organizers who were experienced third year apprentices qualified to meet the Respondent's job requirements.

Here, I adopt my prior finding of fact, discussion and conclusions of laws as set forth in the prior decision and as supplemented by the additional discussion, and the modified remedy and order set forth below and, otherwise I find that cause is not shown that would require reopening of the record.

Discussion

On brief, the Respondent emphasis that it is a residential heating and air-conditioning company and it asserts that "installers" must have 2 years of residential experience to be qualified for the position which encompasses the installation of residential HVAC equipment and duct work, including their associated plumbing and electrical systems. The same experience level is required for "service technician," who troubleshoot and repair residential HVAC equipment and it states that "helpers" are considered entry level with no HVAC experience required. It reasserts its prior contention that the General Counsel failed to show animus, and argues that the discriminatees are not shown to be qualified for installer and service technician positions. It also argues that it would not have hired them (for helper positions) because the persons they did hire were more qualified or preferable under this policy to hire based upon "experience," "referral," or "date of application." Finally, it states that it would not have considered them for hire because their applications were comingled chronologically with other nonreferred applications and utilized only after referral application were exhausted by its policy to review "the most recent applications in the front of the pile."

In its supplemental brief, the General Counsel notes the Board's new analytical framework applies it to the record, and urges that it has proven its case.

A. Refusal to Hire, Refusal to Consider for Hire Criteria

In my earlier decision I stated that :

> The Board endorses a causation test for cases turning on employer motivation, see *Wright Line*, 251 NLRB 1083 (1980), approved in *NLRB V. Transportation Management Corp.*, 462 U.S. 393 (1983). However, the foundation of Section 8(a)(1) and (3) "failure to hire" allegations rest on the dolding of the Supreme Court ruling that an employer may not discriminate against an applicant because of that person's union status, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–187 (1941).

I then went on to analyze the record based on the test set forth in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), and *KRI Constructors*, 290 NLRB 802, 811 (1988), and case cited therein and stated:

> The qualifications of a job applicant may be an expected element of why an employer might refuse to hire any individual and, accordingly, it is customary in relation to criteria (1) that the record be developed to show that an applicant has the basic job experience or training to match up with the position for which an employer is seeking or accepting applications. However, there is no requirement that the General Counsel show (at this stage of the proceeding), that an applicant has superior qualifications that would mandate his selection for employment. Therefore, a resolution of an applicant's total qualifications beyond his basic suitability for the position involved is not an issue relevant to the basic criteria necessary to prove a violation of the Act.

In *FES*, the Board held that in order to establish a discriminatory refusal to hire, the General Counsel must first show:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time or the alleged unlawful conduct; (2) that the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire applicants.

In order to establish a discriminatory refusal to consider for hire, the General Counsel must show:

> (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment.

Once this established, the burden shifts to the Respondent to show that it would not have hired or considered the applicants even in the absence of their union activity or affiliation.

B. Refusal to Hire

On pages 4 through 8 of its supplemental brief, the Respondent list dates pertinent to its hiring of 2 installers, 3 service technicians, and 49[1] helpers (between May 18, 1995, and October 1997).

This hiring occurred during the same timeframe, between May 18, 1995, and April 28, 1997, when 37 union applicants, with one exception (Jesse Stamper), were denied interviews, consideration or hire. This rejection also occurred at the same time the Respondent ran ads on 22 days in May 1995 seeking helpers. Respondent also ran ads in September 1995 seeking helpers and in April and May 1996 it put a sign in front of its facility and on the corner of its street stating that it was hiring helpers, and in March 1997 Respondent placed another ad in the newspaper advertising HVAC positions for which no experience was required. It also ran other ads seeking installers, including ads on April 14 and 17–20 and May 16–20 the period when Jesse Stamper was seeking employment (see p. 11 of the prior decision). Ten "helpers" were hired concurrently with the running of this installer ad (between April 15 and May 30), including Kent Holliday and covert union applicant Steven Reintjes and, finally, Jesse Stamper. While Stamper was known to be a union organizer with several years experience, he was offered below rate wages of only $5 an hour and I reaffirm my previous conclusion that the Respondent's action in this respect was discriminatory and an independent violation of Section 8(a)(3) and (1) of the Act. Kent Holliday, however,

[1] The General Counsel correctly states that 51 helpers were hired inasmuch as the Respondent's list appears to omit covert applicant Stephen Reintjes and Jesse Stamper, the single union applicant who was hired.

was hired as a helper on May 13 but the Respondent brief (and the record) shows that within 3 months (by August 13) he held a position as an installer when he is said to have referred his brother to the Respondent for a helper position.

Under these circumstances, I find that the record supports the inference that the Respondent had a highly flexible criteria for installer qualification rather than a fixed or regularly followed standard. I also infer that it filled its advertised (and unadvertised) needs for installers by hiring applicants as helpers and then giving them the position and responsibilities of installers after an on-the-job review of their skills. This conclusion in turn shows that, in effect, more than two installer positions were filled and that some persons hired as helpers were actually expected to quickly function as installers. Accordingly, the discriminatees herein, especially those who had residential installation experience, with third year apprenticeship skills would appear to have the experience or training for the installer positions that appear to have been available.[2] Otherwise, the fact that it advertised for installers in the spring of 1996, rather than helpers (as it did previously), while proceeding indirectly to hire 10 helpers, appears to be the Respondent's apparent reaction to the Union's earlier application campaign and the filing of charges and it appears to be an apparent attempt to provide a basis for denying consideration to apprenticeship level union applicants.

The net conclusion remains that the record clearly supports the finding that during the critical period the Respondent repeatedly advertised that it needed persons qualified as both helpers and installers, that it hired at least 53 persons for these positions while at the same time denying interviews or hiring to 36 of 37 known union affiliated applicants and, therefore, I find that the General Counsel has satisfied criteria (1).

While the Respondent made a point of the "residential" nature of its business, there is little in the way of persuasive evidence to show that the skills employed in commercial installation of HVAC equipment and duct work are not readily transferable to residential work. Otherwise, many of the applicants did have some specific residential experience and testified that they had apprenticeship training and were third-year apprentices with experience that enabled them to cover a wide range of HVAC skills. Significantly, the Respondent's initial 1995 ads for HVAC helpers specified "no experience necessary" and its supplemental briefs also notes that helpers are considered entry level positions with no HVAC experience required. How then can it rationalize any argument that third-year apprentices are not qualified as helpers or that it would not have hired them because the persons it did hire were more qualified or preferable? I conclude that it cannot.

While it is arguable that not all of the union applicants were sufficiently experienced to be installers, it appears, as noted above, that the Respondent sometimes advertised for installers but then hired applicants as helpers and then shortly thereafter advanced them to an installer's position. Under these circumstances I find that this indicates both that it did not adhere uniformly to its requirements and that the requirements were applied as a pretext for discrimination. Accordingly, I find that the General Counsel has satisfied criteria (2).

Criteria (3), animus, was discussed extensively in the prior decision and I find no reason to change my conclusion that antiunion animus was a motivating factor in the Respondent's decision to fulfill its hiring needs almost exclusively by so-called referrals while at the same time, running want ads and accepting applicants but ostensibly not bothering to look at those applications, conduct which precluded even the consideration of union affiliated applicants. As also noted in the prior decision, this conclusion is reinforced by the Respondent's discriminatory treatment of Stamper when it underpaid the only union applicant it did hire. Moreover, the fact that the Respondent hired only 1 of 37 union affiliated job applicants, when it also hired over 50 nonaffiliated other applicants, also demonstrates statistical animus, see *Glen's Trucking Co.*, 332 NLRB 880 (2000).

The Respondent answers the General Counsel's showing by asserting that it would not have hired the union applicants because the individuals it did hire were more qualified or preferable because of their experience, the fact that they were referrals and the date of their application.

Again, the prior decision substantially addresses the Respondent's defense finding that the Respondent basically ignored their applications and it had not way of knowing the specifics of the individual qualifications at the time it rejected their applications without further consideration. I also found that:

> Organizers were not acting unilaterally but sought employment following the Respondent's public advertisements. When union affiliated applicants filled out an application, the Respondent then applied an almost exclusively subjective procedure and "needed" to fill available positions only when it got a so-called "referral" or when an apparent non-union applicant arrived. The Respondent thereby almost never "needed" to use its criteria of last resort, to look at applications on the "top of the pile," the only way a non-covert union applicant could or would be considered.
>
> The Respondent advertised extensively with ads that said helpers (as well as installers), were "needed" and in fact helpers were hired on 51 occasions between May 1995 and September 1997. Yet (with minor exceptions), the Respondent refused to even look at applications that were filed at various times (generally right after ads were published). The alleged discriminatees used the procedure advertised but the Respondent basically failed to contact, interview or hire any of them. The Respondent used a different, unpublicized referral procedure, which resulted in the hiring of only employees who were nonunion. The Respondent's reliance on hiring only those who were referred by nonunion employees essentially precluded Union members from being considered and this hiring procedure

[2] Under the *FES* decision it is not necessary to specifically "match up" applicants with specific jobs at this time and the compliance stage of a proceeding still may be used to address and determine the order in which the various discriminatees would have been offered instatement as helpers or installers and whether and when they would have been advanced to an installer's position.

allowed the Respondent to perpetuate a nonunion workforce.

Here, I also note that covert applicant Reintjes was hired even though he was not referred to Respondent by anyone. He applied on April 15 and Respondent contacted him on April 30, to come in for an interview. Between the date that Reintjes applied and the date Respondent contacted him, 10 other applicants who did reveal their union affiliation applied for employment with Respondent but none of those applicants were ever contacted by Respondent even though their applications were more recent than that of Reintjes. Stamper overtly applied for employment with Respondent on April 16. He then called Respondent on June 12, and was told to come in for an interview, two months after he applied. In the meantime, several other union affiliated applicants applied along with approximately 16 nonunion applicants. Stamper was neither referred nor was he the most recent applicant, but he was interviewed and then hired after he accepted a $5 hour rate of pay (Reintjes was given a $7 rate).

In the applications of the individuals hired by Respondent, five of the individuals put either "self" or some variation of "newspaper" in the box marked "Referred by," documentary evidence that tends to refute Manager Walker's recollection that they were hired as referrals. Under these circumstances, I find that the policies and practices upon which the Respondent relies to justify its actions were not uniformly applied, appear to be more pretextual than persuasive, and I again find that the Respondent has failed to persuasively rebut the General Counsel's showing of unlawful motivation.

A review of the record shows that six union members applied for employment with Respondent in May 1995. Four of them listed on their applications that they had taken HVAC courses at IVY Tech. None of them were contacted but within 3 months of their applications Respondent had hired five new helpers, and none of these individuals' applications reveal any prior HVAC training or experience.

In September and October, 12 other union members applied for employment with Respondent in response to ads Respondent had placed in the local newspaper. Again a majority of these applicants listed their HVAC training and several listed their refrigerant certification. None of these applicants were ever contacted but Respondent hired four helpers and one installer. Only one of those helpers listed any sort of HVAC experience or training on his applications.

In April and May 1996 12 more union members applied and a majority of their applications mention HVAC or sheet metal layout and fabrication skill and experience as well as HVAC contractors as prior employers. Only Stamper was interviewed or hired. After these union members began applying, Respondent put up two signs, one in front of its facility and one on the corner, stating it was hiring and soliciting applications for installer and helper positions. Within 5–6 months of the union organizer applications, Respondent hired over 20 helpers. Only three of these individuals (not including Stamper and covert union member Reintjes), list any type of HVAC experience on their application.

In March and April 1997 seven union members applied for employment in response to ads, at least one of which requested HVAC apprentices with no prior experience required. Six of these applicants listed HVAC experience or training on their applications but none were ever contacted by Respondent. Within 5–6 months of their applications Respondent hired 20 helpers and one installer. Only one of the helpers listed any type of HVAC experience or training on his application. Under these circumstances, and as further discussed in the "Remedy" section below, I specifically find that five of the six May 1995 applicants were discriminatorily denied employment as helpers and are entitled to a make whole and instatement remedy. I find that 5 of the 12 September–October applicants were discriminatorily denied employment as either helpers or installers and are entitled to a make whole and instatement remedy. I find that each of the 12 union members who applied in April and May 1996 and each of those who applied in March and April 1997, were discriminatorily denied employment as helpers or installers and are entitled to a make whole and instatement remedy.

C. Refusal to Consider

The prior decision and the discussion above address the General Counsel's animus burden. Otherwise, the *FES* criterion also requires the General Counsel to show that the Respondent excluded applicants from the hiring process. As noted in the prior decision, the record shows that the Respondent failed and refused to review the application of or to interview 36 of 37 union affiliated applicants and it used its asserted policy of hiring primarily by referrals from current employees to screen out union affiliated applicants for employment and thus it effectively removed the union applicants from its hiring process.

The Respondent contends that it comingled the applications of the alleged discriminatees with the other (nonreferral) applications that were received and placed in a pile with the most recent in front and it followed a policy of contacting or attempting to contact the most recent applicants and that it tried to call several alleged discriminatees.

Manager Walker testified that he only went to the nonreferral file on one or two occasions in 1995 through 1997 and that he didn't know why the Company was running ads. Cheryl Maddox, Respondent's secretary/treasurer, testified that she called three union applicants (names unknown) for interviews and that none called back. Here, I find that Walker's testimony is inconsistent with the record. As noted above, the Respondent did interview and hire some nonreferrals (it admits to at least six) on widely separate occasion stretching between 1995 and 1997 and not only at the time in late spring 1996 when Maddox made a few calls. Moreover, Reintjes applied for employment with Respondent without revealing his union affiliation on April 15, was not referred to Respondent by anyone. Respondent contacted him on April 30, to come in for an interview. Between the date that Reintjes applied and the date Respondent contacted him, ten other applicants who did not reveal their union affiliation applied for employment with Respondent. None of those applicants were ever contacted by Respondent even though their applications were more recent than that

of Reintjes. Reintjes was neither referred nor the most recent applicant, and yet Respondent selected him to interview for a helper position. The one occasion where it called Stamper clearly was an aberration and, otherwise, I find that the Respondent's explanations regarding its reliance on referrals, it continuous running of ads and it practices for dealing with nonreferral applicants is inherently unbelievable. At the very least, it is highly questionable and it clearly does not persuasively show that it would not have considered these applicants even in the absence of their union affiliation.

In summation, I find that the Respondent maintained policies and engaged in practices that are contrary to basic prohibitions against discrimination in regard to hire, accordingly, I find that the General Counsel has met its overall burden and shown that the Respondent's failure and refusal to consider and hire the discriminatees named below violated Section 8(a)(3) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce with in the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in a pattern or practice that allows screening of job applicants to determine suspected union sympathizers and by failing and refusing to consider applicants for employment or failing and refusing to employ job applicants for positions as HVAC helpers or installers unless they were referred by non union sources and because they are members of the Union or because of their union sympathies, Respondent discriminated in regard to hire in violation of Section 8(a)(3) and (1) of the Act.

4. By employing union sympathizer Jesse Stamper at a lower rate than other helpers because of his union affiliation, the Respondent discriminated in regard to terms and conditions of employment in violation of Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

It having been found that the Respondent unlawfully discriminated against job applicants including Tyrone Moore, Peter Williams, Donald McQueen Jr., James Santacroce Jr., Devin Tice, Jason Tice, Gabriel Brooking, Ronald L. Cornwell Jr., Todd M. Huyghe, James A. Hale, Stephen M. Hill, Anthony W. Smith, Theodore A. DeFronzie Jr., Brady P. Piercefield, Don A. Campbell, Lloyd T. Campbell, Ryan M. Striby, Jason A. Wiley, Eric J. Edwards, Craig A. Gruell, Darlene J. Haemmerle, Frank J. Sullivan II, Michael J. Wheatley, Keith A. Peacher, Mark Chittum, Tim Choate, Michael Rohr, Steven Shea, Corey Stein, Jason Ellis, and David Walker, based on their suspected union sympathies and because they were not "referred" to the Respondent, it will be recommended that Respondent be ordered to consider them for employment. It also is recommended that the Respondent be order to offer those named below immediate and full instatement to certain discriminatees in the position of helper or installer, without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings they may have suffered by reason of the failure to give them nondiscriminatory consideration for employment, by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

In accordance with *FES* and *Dean General Contractors*, 285 NLRB 573 (1987), refusal to hire discriminatees are entitled to a make whole remedy. It is noted that it is well established that when ambiguities or uncertainties exist in compliance proceedings, doubts should be resolved in favor of the wronged party rather than the wrong doer, see *Paper Moon Milano*, 318 NLRB 962, 963 (1995), and *United Aircraft Corp.*, 204 NLRB 1068 (1973). Under these circumstances, it should be found that the discriminatees who were refused employment at a time when their applications were "fresh" see *Eckert Fire Protection*, 332 NLRB 198 (2000), and when the Respondent contemporaneously and discriminatorily hired nonunion applicants for available positions, would have been hired and, accordingly, these discriminatees are entitled to instatement and a make whole remedy, as follows: 5 of the following 5 of the 6 (Peter Williams, Tyrone Moore, Donald McQueen, Jon Santacroce, Devin Tice, and Jason Tice), who applied between May 18 and 25, 1995; 4 helpers 1 installer of the 12 (Gabriel Brooking, Ronald Cornwell, Todd Huyghe, Gene Hail, Stephen Hail, Anthony Abel, Douglas Barkdull, Steven Rogers, George Sears, Anthony Smith, Brady Piercefield, and Theodore Defronzo Jr.), who applied between September 7 and October 5, 1995; Don Campbell, Lloyd Campbell, Ryan Striby, Jason Wiley, Eric Edwards, Craig Gruell, Darlene Haemmerle, Frank Sullivan, Michael Wheatley, Keith Peacher, and Kevin Heckinger who applied between April 16 and May 20, 1996; and Timothy Choate, Mark Chittum, Michael Rhohr, Steve Shea, Cory Stein, Jason Ellis, and David Walker who applied between March 12 and April 25, 1997; leaving to compliance the determination of specific individuals and any limits on the instatement remedy and the extent or tolling of the Respondent's liability where the Respondent will have the opportunity to show limiting factors, see *Ferguson Electric Co.*, 330 NLRB 514 (2000), and *Serrano Painting*, 331 NLRB 928 (2000).

It also having been found that the Respondent discriminatorily paid Jesse Stamper at a lower rate than other helpers, it will be recommended that he be made whole by paying him the difference between the $5-an-hour rate he received and the rate paid to other starting helpers with his experience, plus interest as noted above. Otherwise it is not considered necessary that a broad Order be issued.

[3] Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

On the foregoing findings of fact and conclusions of laws, on the entire record, and pursuant to Section 10(c) of the Act I hereby issue the following recommended[4]

ORDER

The Respondent, Ken Maddox Heating & Air Conditioning, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discriminating in the rate of pay offered and paid to applicants known to be affiliated with a union.

(b) Refusing to consider for employment or refusing to hire job applicants for the position of heating and air-conditioning helper and installer because they are members or sympathizers of the Union or because they were not referred to the Respondent.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, make whole Jesse Stamper for all losses he incurred as a result of the discrimination against him, in the manner specified in the remedy section and remove from its files any reference to the lower wages paid to Jesse Stamper and notify him in writing that this has been done and that its paying him lower wages will not be used against him in any way.

(b) Within 14 days from the date of this Order, offer the following discriminatees immediate and full instatement to the HVAC positions for which the Respondent was hiring: Tyrone Moore, Peter Williams, Donald McQueen Jr., James Santacroce Jr., Devin Tice, Jason Tice, Gabriel Brooking, Ronald L. Cornwell Jr., Todd M. Huyghe, James A. Hale, Stephen M. Hill, Anthony W. Smith, Theodore A. DeFronzie Jr., Brady P. Piercefield, Don A. Cambell, Lloyd T. Campbell, Ryan M. Striby, Jason A. Wiley, Eric J. Edwards, Craig A. Gruell, Darlene J. Haemmerle, Frank J. Sullivan II, Michael J. Wheatley, Keith A. Peacher, Mark Chittum, Tim Choate, Michael Rohr, Steven Shea, Corey Stein, Jason Ellis, and David Walker or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them as set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, consider each of the above-named discriminatees for hire to fill future job openings in accordance with nondiscriminatory criteria and, for a period of 1 year thereafter, to the extent they are not provided instatement under (b) above, select from these applicants and notify such discriminatees, the Union and the Regional Director for Region 25 of future openings in positions for which the discriminatees applied or in positions for which they subsequently became qualified, or of substantially equivalent positions.

(d) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful refusals to hire and refusal to consider for hire the discriminatees named above and, within 3 days thereafter, notify the discriminatees in writing that this had been done and that the refusals to hire and refusal to consider for hire will not be used against them in any way.

(e) Preserve, and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days of service by the Region, post at its Indianapolis, Indiana facilities and all current jobsites copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and job applicants customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its expense, a copy of the notice to all current employees, former employees employed by Respondent and job applicants at its Indianapolis facility at any time since October 26, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. December 8, 2000.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discriminate in the rate of pay offered and paid to applicants known to be affiliated with a union.

WE WILL NOT refuse to consider for employment or refuse to hire job applicants for the position of HVAC helper and installer because they are members or sympathizers of the Union or because they were not referred to the Respondent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days of this Order, make whole Jesse Stamper for all losses he incurred as a result of the discrimination against him, in the manner specified in the remedy section of the decision and remove from our files any reference to the lower wages paid to Jesse Stamper and notify him in writing that this has been done and that its paying him lower wages will not be used against him in any way.

WE WILL within 14 days from the date of this Order, offer the following discriminatees immediate and full instatement to the HVAC positions for which the we were hiring: Tyrone Moore, Peter Williams, Donald McQueen Jr., James Santacroce Jr., Devin Tice, Jason Tice, Gabriel Brooking, Ronald L. Cornwell Jr., Todd M. Huyghe, James A. Hale, Stephen M. Hill, Anthony W. Smith, Theodore A. DeFronzie Jr., Brady P. Piercefield, Don A. Cambell, Lloyd T. Campbell, Ryan M. Striby, Jason A. Wiley, Eric J. Edwards, Craig A. Gruell, Darlene J. Haemmerle, Frank J. Sullivan II, Michael J. Wheatley, Keith A. Peacher, Mark Chittum, Tim Choate, Michael Rohr, Steven Shea, Corey Stein, Jason Ellis, and David Walker, and if such positions no longer exist, to substantially equivalent positions and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them as set forth in the remedy section of the decision.

WE WILL within 14 days from the date of this Order, consider each of the above-named discriminatees for hire to fill future job openings in accordance with nondiscriminatory criteria and, for a period of 1 year thereafter, to the extent they are not provided instatement as provided above, select from these applicants and notify such discriminatees, the Union and the Regional Director for Region 25 of future openings in positions for which the discriminatees applied or in positions for which they subsequently became qualified, or of substantially equivalent positions.

WE WILL within 14 days from the date of this Order, remove from our files any and all references to the unlawful refusals to hire and refusal to consider for hire the discriminatees named above and, within 3 days thereafter, notify them in writing that this had been done and that the refusals to hire and consider for hire will not be used against them in any way.

KEN MADDOX HEATING & AIR CONDITIONING, INC.